Office-Supreme Court, U.S.
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81-123

No.

IN THE

# Supreme Court of the United States

**October Term, 1981**

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IN THE MATTER OF THE APPLICATION

OF

MARY E. WINTERS,

*Petitioner,*

*against*

THEODORE M. BECK, M.D.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

## PETITION FOR CERTIORARI

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## Question Presented.

Does the manner of applying New York's statute of limitations (C.P.L.R. §214[6] prior to 1975 amend.), which bars suit or action at law against the operating physician prior to Petitioner suffering any injury (pregnancy) caused by said physician negligently performing a tubal ligation upon her, deny Petitioner her rights to procedural and substantive due process and equal protection under the 14th Amendment, Section 1?

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IN THE

**SUPREME COURT OF THE UNITED STATES**

SEPTEMBER TERM 1981.

No.

IN THE MATTER

OF

The Application of MARY E. WINTERS,

*Petitioner,*

*against*

THEODORE M. BECK, M. D.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

## PETITION FOR CERTIORARI.

Petitioner Mary E. Winters respectfully prays that a writ of certiorari issue to review the order of the Court of Appeals entered in this case on June 18, 1981.

## Opinions Below.

The slip opinion of the New York State Court of Appeals, which denied leave to appeal, reproduced in the Appendix is not as yet reported. The opinion of the New York Supreme Court, Appellate Division, Second Judicial Department, affirming dismissal of the medical malpractice action is reproduced in the Appendix, and is reported at A. D. 2d , N. Y. S. 2d . The decision and judgment of the New York Supreme Court, Westchester County, which dismissed the action as barred by statute of limitations is reproduced in the Appendix.

## Jurisdiction.

The opinion of the New York State Court of Appeals, which affirmed the judgment of dismissal, was issued on June 18, 1981. The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1254(1) and (3).

## Relevant Statute and Constitutional Provision.

(A). §214 of the New York Civil Practice Law and Rules, which provides in pertinent part that:

> "The following actions must be commenced within three years: * * * 6. an action to recover damages for malpractice."

(B). Section 1 of the 14th Amendment of the United States Constitution, which provides in pertinent part that:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**Statement of the Case.**

On or about October 27, 1972, upon the urging of respondent, Theodore M. Beck, M. D., a surgeon, petitioner, Mary Winters, employed the respondent to perform a sterilization operation known as a tubal ligation.

Dr. Beck advised Mrs. Winters that the operation would permanently sterilize her, and Mrs. Winters relied upon this representation and upon the doctor's skill in performing said operation.

On or about October 4, 1978, Mrs. Winters discovered that she was approximately three months pregnant. Because she had had a very difficult delivery of her last child on October 26, 1972, it was medically necessary for her to undergo an abortion. On October 9, 1978, Mrs. Winters underwent an abortion which caused her extreme mental anguish and suffering.

Mary Winters brought this action by service of a summons and complaint on September 20, 1979, only one year and two months after she became pregnant, thereby suffering an injury. Dr. Beck moved to dismiss the malpractice claim on the ground that the statute of limitations had expired, CPLR §214(6) (prior to the 1975 amendment). The motion was granted, from which plaintiff now appeals.

**Reasons for Granting the Writ.**

The decision and judgment dismissing the medical malpractice action, and affirmance on appeals, deprives petitioner of her rights under the Fourteenth Amendment.

The substance of petitioner's constitutional challenge is that the application of the statute of limitations, CPLR §214(6) (prior to the 1975 amendment), by the New York Courts, violates petitioner's constitutional right to equal protection, and procedural and substantive due process under the 14th Amendment of the U. S. Constitution. *Unlike* other cases barred by New York's statute of limitations, her case was barred before she even suffered an injury, let alone discovery of her injury. She was thus barred from recovery before her cause of action arose.

Under the U. S. Constitution and common law, going back to *Marbury v. Madison,* 1 Cranch (U. S.) 137 (1803): "It is a general and undisputable rule, that where there is a legal right, there is also legal remedy by suit or action at law, whenever that legal right is invaded * * *" *Id.,* at 162.

Under general common-law tort theory, a cause of action does not exist until an *injury* occurs, and the statute of limitations does not begin to run until *injury* occurs. The case at bar is unique in that Mrs. Winters was not *injured* until she became pregnant in July, 1978. Because Mrs. Winters consented to the tubal ligation operation in October, 1972, it does *not* constitute an injury, yet the lower courts have held the statute of limitations began to run on that date. The statute, CPLR §214(6) (prior to the 1975 amendment), does not mandate such a ruling.

Due process requires, and it is presumed with all statutes of limitations, that every plaintiff shall be and is afforded some reasonable period within which to seek legal redress.

Yet petitioner was barred from redress before an injury occurred, and was thus totally and arbitrarily denied redress.

The New York courts, holding that the statute began to run when Dr. Beck performed the tubal ligation operation, assumed that Mrs. Winters had some reasonable time to sue after that date. But, having no injury until almost six years later, Mrs. Winters could *not* sue. Thus the presumption was false. Under constitutional law, when a false presumption effectively denies a person due process, the statute or rule must be struck. Thus the lower courts must be reversed.

The growing trend and more humane federal and state rule is that the statute of limitations commences running at the time of *discovery* of the injury.

The rationale of the New York courts is to minimize a physician's liability by restricting the "foreign object" exception. *Merced v. New York City Health and Hospitals Corporation,* 44 N. Y. 2d 398, 406 N. Y. S. 2d 9 (1978).

Writing the opinion of this Court in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U. S. 388 (1971), Mr. Justice Brennan quoted Justice Marshall's words that " 'the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,' " *id.*, at 397, in concluding that, where a plaintiff's Fourth Amendment right to be free of search and seizure was violated, he is entitled to recover money damages.

In *Owen v. City of Independence, Mo.*, U. S. , 63 L. Ed. 2d 673 (1980), the Supreme Court held that municipalities do not enjoy a qualified immunity under 42

USCA §1983. "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees * * * yet owing to the qualified immunity enjoyed by most government officials, see *Scheuer v. Rhodes*, 14 U. S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Ops 2d 474 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing consideration counsel otherwise, the injustice of such a result should not be tolerated." *Id.*, 63 L. Ed. 2d at 693. Thus, the Supreme Court removed the last obstacle of municipal immunity, finding it subordinate to the policy that a plaintiff must be fairly afforded a remedy at law.

In the case at bar, on the day Mrs. Winters became pregnant, her right to be free of injuries caused by another person's negligence was violated. She did not have a cause of action before she became pregnant because she had suffered no injury. Yet, under CPLR §214(6) (before the 1975 Amendment) and §214-a, Mrs. Winters would be denied a remedy at law on the very first day she suffered an injury. As applied to Mrs. Winters' case, such a holding is violative of the "very essence of civil liberty" and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Mrs. Winters' case can be distinguished from most malpractice cases in that the patient's injury usually occurs at the time of the physician's negligent treatment. In New York, the rule has been pushed to an extreme, concluding in a case where a man discovered cancer 13 years after his physician injected a substance into his sinuses, that the injury began at the time of the injection. *Schwartz v. Hayden Newport Chem. Corp.*, 12 N. Y. 2d 212, 237 N. Y. S. 2d 714 (1963). The Court of Appeals in *Schwartz*

cited *Schmidt v. Merchant Dispatch Trans. Co.*, 270 N. Y. 287 (1936), and quoted Judge Lehman's opinion:

> " 'There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury. Otherwise, in extreme cases a cause of action might be barred before liability arose.' 270 N. Y. p. 300, 200 N. E. p. 827." *Id.*, 12 N. Y. 2d at 216, 237 N. Y. S. 2d at 717.

In *Schmidt*, an employee sued his employer for negligently allowing dust to accumulate in plaintiff's working area which caused pneumoconiosis in the plaintiff. The Court, in *Schwartz*, reflecting upon the facts found that "We must assume that the dust immediately acted upon Schmidt's lung tissue," *id.*, 12 N. Y. 2d at 217, 237 N. Y. S. 2d at 717.

Mrs. Winters suffered no injury before she became pregnant. Thus, if the Statute of Limitations is held to run from the date of Mrs. Winters' tubal ligation, her cause of action will "be barred before liability arose," and will contradict the reasoning given by Judge Lehman in *Schmidt, supra.*

The Court of Appeals followed *Schmidt, supra*, in 1963 in *Schwartz v. Hayden Newport Chem. Corp.*, 12 N. Y. 2d 212, 237 N. Y. S. 2d 714 (1963), where the plaintiff sued for loss of his eye, allegedly caused by the injection of a carcinogenic substance into his sinuses to make them more perceptible in an X-ray, thirteen years before the cancer was discovered. The Court of Appeals held, as in *Schmidt*, the "action accrues only when there is only some actual deterioration of a plaintiff's bodily structure. This is the reasoning of cases holding that the statute doesn't begin to run until the defendant's wrong harms plaintiff. (Citations omitted) * * * but Judge Lehman's view in the *Schmidt*

case is right as we must assume that the dust immediately acted upon Schmidt's lung tissue." *Id.*, 237 N. Y. S. 2d at 717.

In *Victorson v. Bock Laundry Machine Co.*, 37 N. Y. 2d 395, 373 N. Y. S. 2d 39 (1975), the Court of Appeals reviewed the Statute of Limitations as it applies to product liability cases, and held that "the cause of action if any there be, should accrue at the time of the injury sustained. To hold that it somehow came into being prior thereto would defy both logic and experience." *Id.*, 373 N. Y. S. 2d at 43.

Especially relevant to the case at bar is the following language of the Court of Appeals in *Victorson v. Bock Laundry Machine, supra*:

> " '[I]t is all but unthinkable that a person should be time-barred from prosecuting the cause of action before he ever had one.' (*Mendel v. Pittsburgh Plate Glass Co., supra*, 25 N. Y. 2d p. 346, 305 N. Y. S. 2d p. 495, 253 N. E. 2d p. 211.) In this perspective the analogy in principle is to 'tort' claims, that is claims for injury to person or property, as to most of which, although not all, the statute runs from the date of injury. (*Schmidt v. Merchant's Desp. Transp. Co.*, 270 N. Y. 287, 299-301, 200 N. E. 824, 826; *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N. Y. 2d 427, 301 N. Y. S. 2d 23, 248 N. E. 2d 871; Restatement, Torts, §899, comment c, p. 525; cf. 14 C. J. S. Case, Action on, §§1, 2.) * * *" *Id.*, 373 N. Y. S. 2d at 43.

Continuing, the Court of Appeals in *Victorson, supra,* presented balancing concerns which go into applying a statute of limitations:

> "Then over how long a period thereafter should the injured party be allowed to assert his claim? As in other instances in which periods of limitations must be fixed, the answer depends on a nice balancing of policy considerations. 'Any Statute of Limitations reflects a policy that there must come a time after which fairness demand that a defendant should not be harried; the duration of the period is chosen with a balancing sense of fairness to the claimant that he shall not unreasonably be deprived of his right to assert his claim' (*Caffaro v. Trayna*, 35 N. Y. 2d 245, 250, 360 N. Y. S. 2d 847, 850, 319 N. E. 2d 174, 176). We identify no material factors which suggest that the period of limitation should be different where it is sought to impose liability on the manufacturer on the theory of strict products liability rather than on the theory of negligence. Substantially similar considerations are equally cogent and persuasive." *Id.*, 373 N. Y. S. 2d at 43, 44.

In the case at bar, where the respondent performed an operation with the petitioner's consent, albeit negligent, the purpose of said operation being to prevent pregnancy, the petitioner was not injured until she became pregnant. Petitioning now from dismissal of her negligence action, petitioner seeks equality with other negligence plaintiffs and the application of the rule that the statute commences the day the petitioner was injured.

**Due process requires, and it is presumed with all Statutes of Limitations, that every plaintiff shall be and is afforded some reasonable period to seek legal redress.**

It has been found that the legislature in enacting a Statute of Limitations presumes there is some reasonable

period of time in which a plaintiff can bring his action, and that the Statute of Limitations then limits that period:

> "Where a Statute of Limitations shortens the time for the enforcement of an existing right, the legislature must nevertheless afford the parties a reasonable time in which to prosecute their claims, and the fact that a reasonable time elapses between the passage of such a law and the time it takes effect is not enough." *McKinney's Statutes* §59, page 131.

Although this is in reference to the retrospective operation of a new Statute of Limitations, the principle behind the rule is that *some* reasonable time period in which to sue must be allowed. If Mrs. Winters' claim is barred by the Statute of Limitations, this principle will be violated:

> "Whenever the legislature limits the time for commencing a cause of action * * * so far as the party affected is concerned, a valuable right is being restricted. Hence, a reasonable time in which to act must be provided." *Block v. Schwartz,* 266 App. Div. 188, 41 N. Y. S. 2d 837 (1st Dept. 1943).

In *Block*, the plaintiff's bank account was depleted by forged endorsements on February 10, 1938; on March 13, 1941, a new statute became effective, limiting the time to two years to make a demand upon a bank on a forged endorsement. The Appellate Division held that plaintiff's demand made on August 6, 1941, was timely, as some reasonable amount of time had to be afforded the plaintiff after the effective date of the statute.

The Court of Appeals declared a recording statute unconstitutional which required recording of a reverter in-

terest by 1961 by persons who in 1961 could not be ascertained. Such a requirement was impossible to fulfill in 1961, and the effect of the failure to record would have been the forfeiture of a property interest without the due process of law. *Bd. of Ed. of Central School District No. 1 v. Miles,* 15 N. Y. 2d 364, 259 N. Y. S. 2d 129 (1965). "Under the circumstances," the Court of Appeals held, "section 345 cannot be sustained as a Statute of Limitations since it purports to bar the remedy before the right to enforce it has matured." *Id.*, 50 N. Y. 2d at 374, 259 N. Y. S. 2d at 137.

So too, in Mrs. Winters' case, the Statute of Limitations purports to bar her remedy before the right to enforce it has occurred.

Behind the Statute of Limitations is the presumption that plaintiffs are afforded some period of time in which they can sue. *Bd. of Ed. of Central School District No. 1 v. Miles, supra.*

The United States Supreme Court has declared statutes unconstitutional where the statutes are based upon irrebuttable presumptions which are false in the cases before it. In *Cleveland Bd. of Ed. v. LaFleur,* 414 U. S. 632 (1974), a school board required that pregnant teachers take leave at least five months before expected birth. The Court struck down the rule as unconstitutional in its conclusive presumption that all pregnant teachers became incapacitated in their fourth month. The Court found the regulation violative of the Due Process Clause of the Fourteenth Amendment in that there was an "unwarranted conclusive presumption." *Id.*, at 651.

In *Turner v. Dept. of Employment Security,* 423 U. S. 44 (1975), the Court struck down a statute which made

pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of birth until six weeks after birth. "The presumption of incapacity * * * is virtually identical to the presumption found unconstitutional in *Cleveland Bd. of Ed. v. LaFleur* [*supra*] * * * It cannot be doubted that a substantial number of working women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth * * * We conclude * * * the statute's incorporation of a conclusive presumption of incapacity * * * is unconstitutionally invalid," *id.*, at 46.

In *Vlandis v. Kline*, 412 U. S. 441 (1973), the Court struck down a Connecticut regulation which imposed higher tuition for a student's entire academic attendance if he began attendance as an out-of-state resident. Finding the regulation was based on an irrebuttable presumption that every such person remains a non-resident for his entire period of attendance, the Court found the presumption "violative of the Due Process Clause" because it failed to recognize exceptions to the presumption. *Id.*, at 453.

In *U. S. Dept. of Agriculture v. Murry*, 413 U. S. 508 (1974), the Court struck down a "tax dependent" food stamp regulation, finding that the regulation created a conclusive presumption that a tax dependent's household is not needy. The Court concluded that the regulation "is not a rational measure of the need of a household with which the child of a tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact. It therefore lacks the critical ingredients of due process found wanting in *Vlandis v. Kline*, [*supra*]." *Id.*, at 515.

By analogy, in Mrs. Winters' case, the Statute of Limitations creates a presumption that she had some time in

which to sue. This presumption is false as the lower court applies the statute in Mrs. Winters' malpractice case and thus such an application is violative of the Due Process Clause of the Fourteenth Amendment as it applies to Mrs. Winters and persons similarly situated.

**New York's rule in its malpractice Statute of Limitations is contrary to the growing trend and more humane federal and state rules that commence the running at the time of discovery of injury.**

New York's general rule that the Statute of Limitations in malpractice begins to run from the time of the act of malpractice is contrary to the growing trend and more humane rule that the running of the statute begins at the time of discovery. Alabama, Connecticut, Illinois, California, Arizona, Hawaii, Idaho, Maryland, Michigan, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, Texas, West Virginia, Florida, and the Federal Tort Claims Act apply a rule in which the running of the period commences at a reasonabale time after discovery. Louisell and Williams, *Medical Malpractice*, Volume 1 (Matthew Bender 1973) (Supp. 1979).

"The Federal Courts have held that in medical malpractice actions against the government the limitation period does not begin to run until 'the claimant [has] discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice.' *Toal v. U. S.*, 438 F. 2d 222, 225 (2d Cir. 1971); *Quinton v. U. S.*, 304 F. 2d 234 (5th Cir. 1962)." This rule has also been expounded and upheld in *Kubrick v. U. S.*, 581 F. 2d 1092 (3rd Cir. 1978); *DeWitt v. U. S.*, 593 F. 2d 276 (7th Cir. 1979); *Exnicious v. U. S.*, 563 F. 2d 418 (10th Cir. 1977); *Raymond v. Eli Lilly & Co.*, 556 F. 2d 628 (1st Cir. 1977).

The United States Supreme Court in *Urie v. Thompson*, 337 U. S. 163 (1949), held that the running of the Statute of Limitations under the Federal Employers' Liability Act began " 'only when the accumulated effects of the deleterious substance manifest themselves' * * * *Associated Indemnity Corp. v. Industrial Accident Commission*, 124 Cal. App. 378, 381," *id.*, at 170, that is, whether injury to plaintiff became evident. "We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally the assertion of claims within a specified period of time after notice of the invasion of legal rights." *Id.*, at 170.

The New York rule of accrual at the time of malpractice was criticized by its own Law Review Commission in 1962; a rule of accrual at the time of discovery within an overall six-year limitation was recommended. *Report of the Law Review Commission for 1962*, pages 231-285.

In view of the broad criticism of New York's harsh rule of accrual, we ask this Court to recognize a humane and logically acceptable exception to the general rule in malpractice cases and find accrual at the time of *actual* injury to Mrs. Winters, that is, approximately July 4, 1978, the day before she became pregnant. Such a rule would not necessarily contradict the legislative intent of CPLR §214(6) or 214-a in that the presumption is that injury occurs at the time of the act of malpractice.

## CONCLUSION.

**For the above stated reasons, this petition for a writ of certiorari to the New York Court of Appeals should be granted.**

Dated: White Plains, New York,
July 16, 1981.

Respectfully submitted,

RICHARD S. SCANLAN,
Attorney for Petitioner,
199 Main Street,
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(914) 949-2560.

# APPENDIX.

## Decision of the Court of Appeals.

2 Mo. No. 600

MARY E. WINTERS,

*Appellant,*

*vs.*

THEODORE M. BECK, M.D.,

*Respondent.*

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

**Order of Court of Appeals, Dated April 9, 1981.**

COURT OF APPEALS,

STATE OF NEW YORK.

As a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of April A. D. 1981

Present,

Hon. Lawrence H. Cooke, Chief Judge, presiding.

2 Mo. No. 416 SSD 50

MARY E. WINTERS,

*Appellant,*

*vs.*

THEODORE M. BECK,

*Respondent.*

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

**ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.**

**JOHN W. BELLACOSA**
**Clerk of the Court**

**Order of Appellate Division, Second Department, Dated December 29, 1980.**

**jm**

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 29, 1980.

Hon. Vincent D. Damiani,
Justice Presiding,
Hon. Vito J. Titone,
Hon. John P. Cohalan, Jr.,
Hon. Moses M. Weinstein,
Associate Justices.

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MARY E. WINTERS,

*Appellant,*

*v.*

THEODORE M. BECK,

*Respondent.*

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In the above entitled cause, the above named Mary E. Winters, plaintiff having appealed to this court from (1) an order of the Supreme Court, Westchester County, dated March 26, 1980, which granted defendant's motion

to dismiss the complaint on the ground that it was time-barred by the applicable Statute of Limitations, and (2) the judgment entered thereon on May 28, 1980 and the said appeal having been argued by Claudia W. Brisson, Esq., of counsel for the appellant, and submitted by Michael B. Schad, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the appeal from the order is hereby dismissed, without costs or disbursements (see *Matter of Aho*, 39 NY2d 241, 248), and it is further

ORDERED that the judgment appealed from is hereby unanimously affirmed, without costs or disbursements (see *Merced v. New York City Health & Hosps. Corp.*, 44 NY2d 398, 414-415; *McNight v. New York City Health & Hosps. Corp.*, 70 AD2d 587).

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

**Decision of Appellate Division, Second Department, Dated December 9, 1980.**

B/bh

Vincent D. Damiani, J.P.
Vito J. Titone
John P. Cohalan, Jr.
Moses M. Weinstein, JJ.

____AD 2d____ A—December 9, 1980

3013 E
3013 AE

Mary E. Winters, *appellant,*
*v.* Theodore M. Beck, *respondent.*

Richard S. Scanlan, White Plains, N.Y. (Claudia W. Brisson of counsel), for appellant.

Anthony L. Schiavetti, New York, N.Y. (Michael B. Schad of counsel), for respondent.

In a medical malpractice action, plaintiff appeals from (1) *an order* of the Supreme Court, Westchester County (Beisheim, J.), dated March 26, 1980, which granted defendant's motion to dismiss the complaint on the ground that it was time-barred by the applicable the Statute of Limitations, and (2) *the judgment* entered thereon on May 28, 1980.

*Appeal from the order dismissed,* without costs or disbursements (see *Matter of Aho,* 39 NY2d 241, 248).

*Judgment affirmed,* without costs or disbursements (see *Merced v. New York City Health & Hosps. Corp.*, 44 NY2d 398, 414-415; *McKnight v. New York City Health & Hosps. Corp.*, 70 AD2d 587).

Damiani, J. P., Titone, Cohalan and Weinstein, JJ., concur.

December 29, 1980

**Decision and Judgment of New York Supreme Court, Westchester County.**

SUPREME COURT, STATE OF NEW YORK,

WESTCHESTER COUNTY,

Trial/Special Term, Part.

Present:

Hon. George Beisheim, Jr., Justice.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

MARY E. WINTERS,

*Plaintiff,*

*against*

THEODORE M. BECK, M.D.,

*Defendant.*

Index Number 15473, 1979
Motion Date Jan. 23, 1980
Motion Cal. Number 3

The following papers numbered 1 to 10 read on this motion by defendant for an order pursuant to CPLR 3211-a-5 granting accelerated judgment in that plaintiff's actions are barred by the defense of statute of limitations

| | Papers Numbered |
|---|---|
| Note of Issue | |
| Notice of Motion—Affidavits | 1-3 |
| Exhibits—Memorandum of Law | 4-6 |
| Answering Affidavits—Exhibits | 7-9 |
| Replying Affidavits | 10 |

Upon the foregoing papers it is ordered that this motion is granted. It is not disputed that the medical treatment afforded by defendant to plaintiff occurred on October 27, 1972, and that the summons in this matter was served on September 20, 1979. Defendant herein moves to dismiss the entire complaint, both the first cause of action in contract and the second cause of action in negligence, on the grounds that the six-year statute of limitations on the contract claim has expired (CPLR 213[a]) and that the statute of limitations on the medical malpractice action (CPLR 214[6] prior to the 1975 amendment) had likewise expired on the date of the commencement of the present action. While the court concedes that there is much humanitarian merit to plaintiff's viewpoint, to wit, that the statute of limitations commences at the time of discovery, as compared to commencement at time of the original operation, the law in the State of New York is to the contrary.

The Court of Appeals stated in *Merced v. New York City Health & Hosps. Corp.*, 44 N Y 2d 398, 406 N Y S 2d 9, 377 N E 2d 453, that plaintiff's malpractice claim occurred on the date of the performance of surgery and not on a subsequent date when pregnancy was discovered. In addi-

tion, that case held that the "foreign object" exception set forth in *Flanagan v. Mount Eden Gen. Hosp.*, 24 N Y 2d 427, 301 N Y S 2d 23, 248 N E 2d 871, had no application in delaying the date of accrual of claim based on medical malpractice in connection with a tubal ligation operation and that the statute of limitation commenced on the date of performance of the medical surgery.

In view of the above findings, this court does not deem it necessary to comment on defendant's allegations concerning plaintiff's improper monetary demands in her complaint.

Dated: March 26, 1980

Entered:

GEORGE BEISHEIM, JR.
*J. S. C.*

**Notice of Motion for Order Granting Accelerated Judgment.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE.]

SIRS:

Please Take Notice, that upon the annexed affirmation of Michael B. Schad, Esq., dated the 18th day of October, 1979, with exhibits annexed thereto, and upon all of the pleadings and proceedings heretofore had and held herein, the undersigned, on behalf of the defendant, Theodore M. Beck, M. D., will move this Court, at a Special Term, Part I thereof, to be held in and for the County of Westchester, at the Courthouse, located at 111 Grove Street, City of White Plains, County of Westchester, State of New York, on the 9th day of November, 1979, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order, pursuant to CPLR 3211-a-5, granting accelerated judgment in that either, or both, causes of action may not be maintained because of the affirmative defense of statute of limitations, and for such other and further relief as to this Court seems just and proper.

Please Take Further Notice, that pursuant to the provisions of CPLR 2214-b, any and all opposing affirmations and/or affidavits in opposition are to be served upon the undersigned no later than five (5) days prior to the return date of this motion.

Dated: New York, New York
October 18, 1979

Yours, etc.

ANTHONY L. SCHIAVETTI, ESQ.
Attorney for defendant Theodore M. Beck, M.D.
Office and Post Office Address
1633 Broadway
New York, New York 10019
212 489-7500

To:

Richard S. Scanlan, Esq.
Attorney for Plaintiff
Mary E. Winters
Office and Post Office Address
199 Main Street
White Plains, New York 10601
914 949-2560

**Affirmation of Michael B. Schad in Support of Motion.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE.]

MICHAEL B. SCHAD, Esq., an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the following pursuant to the penalties of perjury.

FIRST: That your affirmant is an attorney at law, associated with Anthony L. Schiavetti, Esq., the attorney for the defendant, Theodore M. Beck, M. D. (hereinafter referred to as Doctor), and as such is fully familiar with all of the facts and circumstances as hereinafter set forth.

SECOND: That this affirmation is executed upon information and belief, the sources of which are the files and records maintained by the law offices of Anthony L. Schiavetti, Esq., pertaining to this matter.

THIRD: That this affirmation is submitted in support of the instant application on behalf of Doctor for an order, pursuant to CPLR 3211-a-5, granting accelerated judgment, in that either or both causes of action may not be maintained because of the affirmative defense of the statute of limitations, and for such other and further relief as to this Court seems just and proper.

FOURTH: That annexed herewith and incorporated by reference thereto is Xerox copy of the summons and complaint, with verification.

FIFTH: That the attention of the Court is initially directed to the summons—specifically the date thereon—17 September, 1979.

SIXTH: That with the summons date being the 17th of September, 1979, a cause of action based upon negligence, and/or a cause of action based upon breach of contract, would have to involve an act or omission that occurred less than three (3) years and/or six (6) years of the date on the summons.

SEVENTH: That the date of the service upon Doctor of the summons with complaint was the 20th of September, 1979. However, for the purposes of the present application, either the date upon the summons, or the date of the service, can be utilized for the basis of the making of the computation of the time within which to bring the present action. Regardless of which date is utilized, the end result is still the same. The statute of limitations is a bar to both causes of action.

EIGHTH: That the date of the alleged performance and/or breach of contract, and/or medical malpractice, is given as the 27th of October, 1972.

NINTH: That actions for breach of contract must be brought within six (6) years following the breach.

TENTH: That actions for negligence must be brought within three (3) years following the commission of the alleged malpractice.

ELEVENTH: That six (6) years from the 27th of October, 1972 would be the 27th of October, 1978.

TWELFTH: That three (3) years from the 27th of October, 1972 would be the 27th of October, 1975.

THIRTEENTH: That the summons, as has been set forth above, contains a date—the 17th of September, 1979—which is outside of both dates above given.

FOURTEENTH: That therefore, the statute of limitations is an absolute bar to both causes of action contained in the complaint.

FIFTEENTH: That specifically for the purposes of requiring the plaintiff, at the earliest possible procedural step, to indicate, not only to Doctor, but to this Court as well, just how, if at all, the affirmative defense of statute of limitations—with respect to both causes of action—may be avoided.

SIXTEENTH: That in addition, with respect to the alleged causes of action dealing with the alleged breach of contract, the following observations are in point. CPLR 3017-c precludes the containment of any monetary demand, either in a complaint, or *ad damnum*, in any action brought to recover damages for alleged personal injuries sustained as a result of alleged medical malpractice. The inclusion of the first cause of action might very well seem to be an attempt to cull and end run on said section. However, the additional observations are in point. A cause of action sounding in breach of contract, with respect to the alleged performance of an agreement by and between a physician and defendant, is a bit strange. To be sure, the Law in the State of New York recognizes that there are instances in which a physician and patient may enter into an agreement for a specified result. Then, of course, there can be a cause of action sounding in breach of agreement—breach of contract—if the specified result is not obtained. If there is to be an action based upon that breach of agreement—that contract—then the damages are limited to, in effect, the actual out-of-pocket expenses

undertaken by the plaintiff, as a result of the breach. More specifically, damages for pain and suffering, and in general, unliquidated damages, are not the subject of causes of action sounding in contract. Unliquidated damages are the subject of causes of action sounding in negligence.

SEVENTEENTH: That the attention of the Court, therefore, is respectfully directed to, amongst other things, Paragraph "Ninth" wherein an allegation is contained that Doctor performed the abortion upon plaintiff. Now, the Court can take judicial notice of the amount of the fees requested by physician for the performance of certain medical procedures. In no way, manner, shape or form would Doctor have, in any way, charged the sum of $1,000,000 as alleged in Paragraph "Tenth". In addition, the plaintiff, in Paragraph "Eighth", alleging that there became knowledge of a pregnancy in October of 1978 certainly could not have, in any way, manner, shape or form suffered either direct and/or indirect and/or consequential damages, in any way, manner, shape or form, even remotely approaching $1,000,000.

EIGHTEENTH: That Doctor advances to this Court, as has been set forth above, that the inclusion of the sum of $1,000,000 in both the "TENTH" Paragraph and the *ad damnum,* is an attempt to make an end run around the provisions of CPLR 3017-c.

NINETEENTH: That the last observations are, of course, not to be taken in any way, manner, shape or form as a possible confession of the inapplicability of the statute of limitations as an absolute bar. The above observations were merely an indication to this Court of what might be described as an attempt to resurrect a cause of action barred by the applicable statute of limitations.

WHEREFORE, the defendant, Theodore M. Beck, M. D., respectfully requests an order, pursuant to CPLR 3211-a-5, granting accelerated judgment in that either, or both, causes of action may not be maintained because of the affirmative defense of statute of limitations, and for such other and further relief as to this Court seems just and proper.

Dated: New York, New York
October 18, 1979

MICHAEL B. SCHAD

**Affirmation of Richard S. Scanlan in Opposition to Motion.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE.]

State of New York,
County of Westchester, ss:

RICHARD S. SCANLAN duly affirms as follows:

1. I am an attorney at law duly admitted to practice before the Bar of this State, am the attorney for the Plaintiff above named, am familiar with the facts, pleadings and proceedings heretofore had herein, make this affirmation under the penalties of perjury and pursuant to C.P.L.R. Rule 2106, and make this affirmation in opposition to Defendant's motion to dismiss pursuant to C.P.L.R. Rule 3211(a) (5) and §§ 213(2) and 214(6).

2. This action was commenced against Theodore M. Beck, M. D., by personal service of the Summons & Complaint in this action upon him on September 20, 1979. A copy of the Summons & Complaint is hereto annexed as Plaintiff's Exhibit "1". The Complaint consists of two causes of action. The first cause of action is in contract, for failure to perform and achieve the agreed upon result of the sterilization for the rest of Plaintiff's life. The second cause of action is in negligence for the failure to perform the operation of tubal ligation with that degree of skill, care and diligence exercised by physicians and surgeons in Defendant's area of specialization.

3. The facts which give rise to this action are that on or about October 27, 1972, upon the advice, urging and representations of the Defendant, Theodore M. Beck, M.D., the Plaintiff, Mary E. Winters, contracted with the Defendant to sterilize the Plaintiff by an operation called a tubal ligation. The operation was performed on or about October 27, 1972. The Plaintiff then relied upon Defendant's promise that the result of the operation would be sterilization for the rest of her life. On or about October 4, 1978, the Plaintiff discovered she was approximately 3 months pregnant and the Plaintiff had an abortion performed on her by this Defendant on or about October 9, 1978. Noteworthy is that the tubal ligation has been performed upon the recommendation and advice of the Defendant himself, for medical reasons, in view of Plaintiff's difficult pregnancy resulting in the birth of her son Billy, by Cesarean Section, on October 26, 1972.

4. The Defendant now moves to dismiss the entire Complaint on the grounds that the six year Statute of Limitations on the contract claim had run (C.P.L.R. §213[2]) and that the Statute of Limitations on the medical malpractice claim (C.P.L.R. §214[6] prior to the 1975 amendment) had run on the date this action was commenced, September 20, 1979.

5. Accordingly, on or about October 4, 1978, the day the Plaintiff discovered the malpractice, and on or about July 4, 1978, the approximate date the Plaintiff became pregnant and acutally sustained her first injury due to Defendant's malpractice, the Plaintiff had no remedy at law for medical malpractice.

6. And, according to the Defendant, on or about October 27, 1978, only 23 days after Plaintiff discovered she was pregnant, and only 18 days after the Plaintiff had to undergo an abortion, the Plaintiff was without a remedy for breach of contract.

7. Hence, the Statute of Limitations, to wit: C.P.L.R. §214(6) or §214-a, as applied to Mrs. Winters' malpractice claim, barring her from access to the courts and a remedy at law before she even suffered an actionable injury, is unconstitutional. Likewise, the Statute of Limitations, to wit: C.P.L.R. §213(2), as Defendant seeks application to block her attempt at a remedy *ex contractu,* is also unconstitutional.

8. In both instances, tort and contract, the Statute of Limitations while constitutional on its fact is indeed unconstitutional in its application to Mrs. Winters, because it bars her from a remedy at law and access to the courts before she actually became aware of the negligence and breach, and before she suffered an actionable injury on the day she became pregnant. In *Marbury v. Madison,* 1 Cranch 137 (1803), the plaintiff, Mr. Marbury, brought an action for a mandamus order to deliver Marbury his commission as a Justice of the Peace. The Court found that the commission was signed by the President and sealed by the Secretary of State, and that the commission was irrevocable and "protected by the laws of this country * * * Secondly," the Court continued:

> "If he [Marbury] has a right, and that right has been violated, do the laws of this country afford him a remedy?
>
> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of a government is to afford that protection. In Great Britain the king himself is sued in respectful form of petition, and he never fails to comply with the judgment of his court.
>
> In the 3rd volume of his commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that legal right is invaded . . .; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to serve this high appellation, if the law furnish no remedy for the violation of a vested legal right." *Id.*, pp. 162-163.

Writing the opinion of the court in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U. S. 388 (1971) Justice Brennan quoted Justice Marshall's words that " 'the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' " *Id.* at p. 397, in concluding that where a plaintiff's Fourth Amendment right to be free of search and seizure was violated, he is entitled to recover money damages.

In the case at bar, on the day Mrs. Winters became pregnant, her right to be free of injuries caused by another person's negligence was violated. She did not have a cause of action before she came pregnant because she had suffered no injury. Yet, under C.P.L.R. §214(6) (before the 1975 Amendment) and §214-a, Mrs. Winters would be denied a remedy at law on the very first day she suffered an injury. As applied to Mrs. Winters' case, such a holding is violative of the "very essence of civil liberty" and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

9. Mrs. Winters' case can be distinguished from most malpractice cases in that the patient's injury usually occurs

at the time of the physician's negligent treatment. In New York, the rule has been pushed to an extreme, concluding in a case where a man discovered cancer 13 years after his physician injected a substance into his sinuses, that the injury began at the time of the injection. *Schwartz v. Hayden Newport Chem. Corp.*, 12 N.Y. 2d 212, 237 N.Y.S.2d 714 (1963). The Court of Appeals in *Schwartz* cited *Schmidt v. Merchant Dispatch Trans. Co.*, 270 N.Y. 287 (1936) and quoted Judge Lehman's opinion:

> " 'There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury. Otherwise, in extreme cases a cause of action might be barred before liability arose' 270 N.Y. p. 300, 200 N.E. p. 827." *Id.*, 12 N.Y.2d at 216, 237 N.Y.S.2d at 717.

In *Schmidt*, an employee sued his employer for negligently allowing dust to accumulate in plaintiff's working area which caused pneumoconiosis in the plaintiff. The Court in *Schwartz*, reflecting upon the facts found that "we must assume that the dust immediately acted upon Schmidt's lung tissue," *Id.*, 12 N.Y.2d at 217, 237 N.Y.S.2d at 717.

Mrs. Winters suffered no injury before she became pregnant. Thus, if the Statute of Limitations is held to run from the date of Mrs. Winters' tubal ligation, her cause of action will "be barred before liability arose", and will contradict the reasoning given by Judge Lehman in *Schmidt, supra.*

10. It has been found that the legislature in enacting a Statute of Limitations presumes there is some reasonable period of time in which a plaintiff can bring his action, and that the Statute of Limitations then limits that period:

> "Where a Statute of Limitations shortens the time for the enforcement of an existing right, the legislature must nevertheless afford the parties a reasonable time in which to prosecute their claims, and the fact that a reasonable time elapses between the passage of such a law and the time it takes effect is not enough." *McKinney's Statutes* §59, p. 131.

Although this is in reference to the retrospective operation of a new Statute of Limitations, the principle behind the rule is that *some* reasonable time period in which to sue must be allowed. If Mrs. Winters' claim is barred by the Statute of Limitations, this principle will be violated:

> "Whenever the legislature limits the time for commencing a cause of action * * * so far as the party affected is concerned, a valuable right is being restricted. Hence, a reasonable time in which to act must be provided." *Block v. Schwartz,* 266 App. Div. 188, 41 N.Y.S.2d 837 (1st Dept. 1943).

In *Block,* the plaintiff's bank account was depleted by forged endorsements on February 10, 1938; on March 13, 1941 a new Statute became effective, limiting the time to two years to make a demand upon a bank on a forged endorsement. The Appellate Division held that plaintiff's demand made on August 6, 1941, was timely as some reasonable amount of time had to be afforded the plaintiff after the effective date of the statute.

The Court of Appeals declared a recording statute unconstitutional which required recording of a reverter interest by 1961 by persons who in 1961 could not be ascertained. Such a requirement was impossible to fulfill in 1961, and the effect of the failure to record would have been the forfeiture of a property interest without the due

process of law. *Bd. of Ed. of Central School District No. 1 v. Miles,* 15 N.Y.2d 364, 259 N.Y.S.2d 129 (1965). "Under the circumstances," the Court of Appeals held, "section 345 cannot be sustained as a Statute of Limitations since it purports to bar the remedy before the right to enforce it has matured." *Id.* 50 N.Y.2d at 374, 259 N.Y.S.2d at 137.

So too, in Mrs. Winters' case, the Statute of Limitations purports to bar her remedy before the right to enforce it has occurred.

12. Behind the Statute of Limitations is the presumption that plaintiffs are afforded some period of time in which they can sue. *Bd. of Ed. of Central School District No. 1 v. Miles, supra.*

The United States Supreme Court has declared statutes unconstitutional where the statutes are based upon irrebutable presumptions which are false in the cases before it. In *Cleveland Bd. of Ed. v. LaFleur,* 414 U.S. 632 (1974), a school board required that pregnant teachers take leave at least 5 months before expected birth. The Court struck down the rule as unconstitutional in its conclusive presumption that all pregnant teachers became incapacitated in their fourth month. The Court found the regulation violative of the Due Process Clause of the Fourteenth Amendment in that there was an "unwarranted conclusive presumption" *Id.* at 651.

In *Turner v. Dept. of Employment Security,* 423 U.S. 44 (1975), the Court struck down a statute which made pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of birth until 6 weeks after birth. "The presumption of incapacity * * * is virtually identical to the presumption found unconstitutional in *Cleveland Bd. of Ed. v. LaFleur [supra]* * * * It cannot be doubted that a substantial

number of working women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth * * * We conclude * * * the statute's incorporation of a conclusive presumption of incapacity * * * is unconstitutionally invalid." *Id.* at 46.

In *Vlandis v. Kline,* 412 U.S. 441 (1973), the Court struck down a Connecticut regulation which imposed higher tuition for a student's entire academic attendance, if he began attendance as an out-of-state resident. Finding the regulation was based on an irrebuttable presumption that every such person remains a non-resident for his entire period of attendance, the Court found the presumption "violative of the Due Process Clause" because it failed to recognize exceptions to the presumption. *Id.* at 453.

In *U.S. Dept. of Agriculture v. Murry,* 413 U.S. 508 (1974), the Court struck down a "tax dependent" food stamp regulation, finding that the regulation created a conclusive presumption that a tax dependents' household is not needy. The Court concluded that the regulation "is not a rational measure of the need of a household with which the child of a tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact. It therefore lacks the critical ingredients of due process found wanting in *Vlandis v. Kline [supra].*" *Id.* at 515.

By analogy, in Mrs. Winters' case, the Statute of Limitations creates a presumption that the Plaintiff has had some time in which to sue. This presumption is false in Mrs. Winters' malpractice claim as well as her contract claim and thus the statute is violative of the Due Process Clause of the Fourteenth Amendment as it applies to Mrs. Winters and persons similarly situated.

13.

> " 'There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury' * * * All of the text writers and relevant cases so hold. Cooley makes the point as well as any. A cause of action accrues upon the violation of a legal right * * *. Some rights * * * are * * * rights not to be damaged under certain circumstances. In such cases the wrong itself is not actionable, the right not violated, and the cause of action non-existent until damage takes place (1 Cooley, Torts [4th Ed.], §46). * * * The action accrues only when there is some actual deterioration of plaintiff's bodily structure." *Schwartz v. Hayden Newport Chem. Corp., supra,* 12 N. Y. 2d at 216, 217, 237 N. Y. S. 2d at 717.

Mrs. Winters suffered no injuries until the day she became pregnant. Under the established rule in torts, the cause of action did not accrue until she was injured by the Defendant's negligence. If this Court holds that Mrs. Winters' cause accrued on the day the Defendant performed the tubal ligation, Mrs. Winters will be deprived of Equal Protection in violation of the Fourteenth Amendment of the United States Constitution.

In *Wales v. Galen,* 61 Misc.2d 681, 306 N.Y.S.2d 614 (Fam. Ct. Richmond Co. 1969), the Court declared unconstitutional as a denial of Equal Protection, Family Court Act §§ 517 and 522, which created a two year limitation period for a paternity proceeding by petitioners other than welfare officials; and gave a 10 year limitation period for welfare officials. In Mrs. Winters' case, she is being denied equal protection with other tort victims whose causes of action accrued at the time of injury.

14. New York's general rule that the Statute of Limitations in malpractice begins to run from the time of the act of malpractice is contrary to the growing trend and more humane rule that the running of the statute begins at the time of discovery. Alabama, Connecticut, Illinois, California, Arizona, Hawaii, Idaho, Maryland, Michigan, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, Texas, West Virginia, Florida, and the Federal Tort Claims Act apply a rule in which the running of the period commences at a reasonable time after discovery. Louisell and Williams, *Medical Malpractice,* Vol. 1 (1973) (Supp. 1979).

"The Federal Courts have held that in medical malpractice actions against the government the limitation period does not begin to run until 'the claimant [has] discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice.' *Toal v. U. S.,* 438 F.2d 222, 225 (2d Cir. 1971); *Quinton v. U. S.,* 304 F.2d 234 (5th Cir. 1962)." This rule has also been expounded and upheld in *Kubrick v. U. S.,* 581 F.2d 1092 (3rd Cir. 1978), *DeWitt v. U. S.,* 593 F.2d 276 (7th Cir. 1979), *Exnicious v. U. S.,* 563 F.2d 418 (10th Cir. 1977), *Raymond v. Eli Lilly & Co.,* 556 F.2d 628 (1st Cir. 1977).

The United States Supreme Court in *Urie v. Thompson,* 337 U.S. 163 (1949) held that the running of the Statute of Limitations under the Federal Employers' Liability Act began " 'only when the accumulated effects of the deleterious substance manifest themselves' . . . *Associated Indemnity Corp. v. Industrial Accident Commission,* 124 Cal. App. 378, 381," *Id.* at 170, that is, whether injury to plaintiff became evident. "We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally the assertion of claims within a specified period of time after notice of the invasion of legal rights." *Id.* at 170.

The New York rule of accrual at the time of malpractice was criticized by the Law Review Commission in 1962; a rule of accrual at the time of discovery within an overall six year limitation was recommended. *Report of the Law Review Commission for 1962,* p. 231-285.

In view of the broad criticism of New York's harsh rule of accrual, we ask that the Court recognize a humane and logically acceptable exception to the general rule in malpractice cases and find accrual at the time of *actual* injury to Mrs. Winters, that is, approximately July 4, 1978, the day before she became pregnant. Such a rule would not necessarily contradict the legislative intent of C.P.L.R. §214(6) or 214-a in that the presumption is that injury occurs at the time of the act of malpractice. This is not so in Mrs. Winters' case.

15. Mrs. Winters' contract claim should not be barred by C.P.L.R. §213(2). Where a physician and a patient contract for a particular result, and that result is not attained, the patient has a cause of action in contract. *Robin v. Firestone,* 308 N. Y. 534 (1955) (the physician promised to cure the plaintiff by an operation called "fulguration" and the plaintiff was not cured; held: he had an action in contract). *Cox v. Stretton,* 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. St. Lawr. Co. 1974) (The physician promised to sterilize the plaintiff by a tubal ligation operation, and plaintiff became pregnant 1½ years after; held: she had an action in both contract and tort).

It has been held that a patient does not have a cause of action in contract when the only agreement was to use due care. *Carr v. Lipshie,* 8 App. Div.2d 330, 187 N.Y.S.2d 564 (1st Dept. 1959). "Actions for breach of contract have been sustained where a specific result is guaranteed by the terms of the agreement, but not where the contracting party either expressly or impliedly promises to * * * use due care." *Id.* 8 App. Div.2 at 332, 187 N.Y.S.2d at 567.

If a physician makes a special contract and then fails to perform, "he is liable for breach of contract even though he used the highest possible professional skill." *Safian v. Aetna Life Ins. Co.*, 260 App. Div. 765, 768, 24 N.Y.S.2d 92, 95 (1st Dept. 1940), aff'd 286 N.Y. 649 (1941).

In Mrs. Winters' case, the Defendant promised that his operation would sterilize her for the rest of her life. As such, the Defendant expressly gave Mrs. Winters a prospective warranty. Where a warranty is prospective, the Statute of Limitations runs from the time of discovery of the breach of warranty. *Woodworth v. Rice Bros. Co.*, 110 Misc. 158, 179 N.Y.Supp. 722, aff'd. 197 App. Div. 971, 184 N.Y.Supp. 958, 233 N.Y. 577 (1922) (The Defendant, seller, warranted his trees were of a certain variety, and discovery of breach occurred 7 years later when the trees matured and did not bear the correct fruit; held: the Statute of Limitations ran from discovery of the breach of the prospective warranty).

By analogy, U.C.C. §2-725(2) states:

> "A cause of action accrues when the breach occurs * * * A breach of warranty occurs when tender of delivery is made, except where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

The Defendant, who expressly stated to Mrs. Winters that the operation would permanently sterilize her for the rest of her life, effectively gave an express warranty. As such, the six year statute of limitations should run from the time of discovery of breach, which was approximately October 4, 1978, the day Mrs. Winters discovered she was pregnant.

It should further be noted that the U.C.C.'s four year statute of limitations is specifically directed toward personal injuries arising from breach of warranty. *McCarthy v. Bristol Laboratories,* 61 A.D.2d 196, 401 N.Y.S.2d 509 (2d Dept. 1978). In *McCarthy,* plaintiff sustained personal injuries as a result of receiving certain drugs and sued for breach of warranty more than three and less than four years after ingesting the drugs. It was held the four year statute of limitations applies to a cause of action to recover for personal injuries arising from a breach of warranty of goods under U.C.C. §2-275(2). In Mrs. Winters' case we are dealing with a contract for services (which receives only a six year period of limitation) and a prospective warranty. As such, Mrs. Winters' contract claim should not be barred and she should be allowed to recover damages for personal injury for breach of warranty.

WHEREFORE, the Plaintiff, Mary E. Winters, respectfully requests that the Defendant's motion to dismiss be denied in all respects.

Dated: White Plains, New York
January 16, 1980

RICHARD S. SCANLAN

**Plaintiff's Exhibit 1, Annexed to Affirmation of Richard S. Scanlan—Summons and Complaint.**

*Summons.*

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE.]

Plaintiff designates Westchester County as the place of trial.

The basis of the venue is Plaintiff's residence.

Plaintiff resides at 600 North Division Street, Peekskill, New York 10566, County of Westchester.

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: September 17, 1979

RICHARD S. SCANLAN, ESQ.,
Attorney for Plaintiff
199 Main Street
White Plains, N. Y. 10601
(914) 949-2560

Defendant's Address:

Theodore M. Beck, M.D.
1116 Main Street
Peekskill, New York

*Complaint.*

SURPEME COURT OF THE STATE OF NEW YORK,

COUNTY OF WESTCHESTER.

[SAME TITLE.]

Plaintiff above named, by her attorney, Richard S. Scanlan, Esq., complaining of the Defendant above named, alleges as follows:

AS AND FOR A FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT

FIRST: At all times hereinafter mentioned, Plaintiff resides at 600 North Division Street, City of Peekskill, County of Westchester, State of New York.

SECOND: At all times hereinafter mentioned, and upon information and belief, Defendant is a physician licensed to practice medicine in the State of New York and has offices at 1116 Main Street in the City of Peekskill, County of Westchester, State of New York.

THIRD: Upon information and belief, on October 26, 1972, when Plaintiff was pregnant at the time, Defendant broke Plaintiff's water and noticed the cord came down and then advised Plaintiff to undergo a Caesarean Section, but since the Operating Room was occupied, Plaintiff gave a natural but difficult birth and delivery, the baby in Defendant's judgment not likely to live and thus was then and there baptized, and again it being Defendant's judgment that the baby had only four days to live.

FOURTH: At all times hereinafter mentioned, and upon information and belief, Defendant represented himself to the public and to Plaintiff as being: (a) skilled,

competent, and qualified in that branch of medicine concerned with gynecology and obstetrics, in caring for and treating the functions and diseases peculiar to women and in caring for and treating women in, before, and after childbirth, (b) skilled, competent and qualified in female sterilization by tying and cutting the Fallopian tubes which carry the female egg to meet the sperm and thus preventing fertilization and pregnancy, (c) that the sterilization procedure would preclude or eliminate Plaintiff from again becoming pregnant, and (d) that Defendant would perform the sterilization operation in a good and workmanlike manner.

FIFTH: On or about October 27, 1972, upon the advice and at the urging of the Defendant, Plaintiff employed Defendant as a surgeon for good and adequate consideration to perform the sterilization procedure suggested by him, namely, a tubal ligation or sterilization procedure on her body after having given birth the evening prior.

SIXTH: Upon information and belief, Defendant agreed as part of his contract of employment to perform the operation suggested by him to prevent Plaintiff from ever again becoming pregnant and endangering her life and the life of the baby, and to perform the same in a thorough, competent and workmanlike manner.

SEVENTH: Upon information and belief, Defendant breached said contract and in violation of the aforesaid duties of said employment and in an unworkmanlike, unprofessional and unskillful manner performed the sterilization procedure.

EIGHTH: In October 1978, Plaintiff first learned of Defendant's breach of said contract when she became pregnant again.

NINTH: Upon the advice of Defendant, Plaintiff had an abortion, performed upon her by the Defendant on October 9, 1978.

TENTH: By reason of Defendant's breach of contract, Plaintiff has suffered direct and consequential damages in the sum of $1,000,000.

AS AND FOR A SECOND CAUSE OF ACTION FOR NEGLIGENCE

ELEVENTH: Repeats, reiterates, and realleges each and every allegation in paragraphs "FIRST" through "TENTH" hereinabove.

TWELFTH: Upon information and belief, Defendant made the representations and urgings referred to in paragraphs "FOURTH" through "SIXTH" hereinabove, and obtained the consent of the Plaintiff to perform the operation.

THIRTEENTH: Upon information and belief, Defendant was negligent in that he failed to perform the sterilization procedure in a manner sufficient to prevent the female egg and the male sperm from meeting, and failed to exercise that degree of skill, care and diligence exercised by physicians and surgeons having regard to the existing state of knowledge in female care, treatment, and sterilization.

FOURTEENTH: Upon information and belief, at the time of the sterilization operation, Defendant was in the exclusive control of the operating room procedures which took place and of the instrumentalities and procedures involved therein.

FIFTEENTH: Upon information and belief, if the sterilization had been performed in a careful and skillful manner Plaintiff would not have become pregnant and suffered other ensuing injuries and damages.

SIXTEENTH: Upon information and belief, by reason of the wrongful, negligent and careless acts and omissions of Defendant, Plaintiff has been injured and damaged in a sum of money exceeding the monetary jurisdictional limitations of all inferior courts having the same subject matter jurisdiction.

WHEREFORE, Plaintiff seeks judgment against Defendant (a) On the first cause of action in a monetary sum of $1,000,000 plus the costs and disbursements of this action, and (b) on the second cause of action in a monetary sum to be determined at trial to sufficiently compensate Plaintiff for her injuries and damages, plus the cost and disbursements of this action.

Dated: White Plains, New York
September 17, 1979

RICHARD S. SCANLAN, ESQ.,
Attorney for Plaintiff
199 Main Street
White Plains, N. Y. 10601
(914) 949-2560

State of New York,
County of Westchester, ss:

MARY E. WINTERS, being duly sworn, deposes and says: Deponent is the Plaintiff in the within action, has read the foregoing Summons & Complaint and knows the contents thereof, and the same is true to her own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters, deponent believes it to be true.

MARY E. WINTERS

Sworn to before me this
17th day of September, 1979.
D. LEE HUBER
Notary Public, State of New York
No. 01HU4604074
Qualified in Westchester County
Commission Expires March 30, 1981